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In the

Supreme Court of the United States.

OCTOBER TERM, 1936.

HOLYOKE WATER POWER COMPANY, *Petitioner*,

v.

AMERICAN WRITING PAPER COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Your petitioner, Holyoke Water Power Company, prays that a writ of certiorari issue to review the final decree of the Circuit Court of Appeals for the First Circuit (R. 104), entered in the above-entitled cause on April 15, 1936, affirming the final decree of the District Court of the United States for the District of Massachusetts (R. 69).

The sole question involved by the error of the Circuit Court of Appeals is the application, after the devaluation of the dollar in January, 1934, of the Joint Resolution of Congress of June 5, 1933, to the rental provisions contained in certain indentures to which your petitioner and the respondent are parties.

Opinions Below.

One opinion was delivered by the District Court. It was written by District Judge Elisha H. Brewster and filed July 2, 1935. It appears on page 70 of the Record and is reported in 11 Fed. Supp. 518. In this opinion Judge Brewster referred to, and stated that he felt bound by, an earlier decision rendered by District Judge Hugh D. McLellan in a case involving rentals which became due under these same indentures before the devaluation of the dollar and between these same parties (R. 70, 71). The opinion in that case was filed January 2, 1935, and is reported in 9 Fed. Supp. 451.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilson, Bingham and Morton) was written by Wilson, J., was filed April 15, 1936, and appears at page 91 of the Record. It is reported in 83 Fed. (2d) 398.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U.S.C.A. sec. 347). The decree of the Circuit Court of Appeals was entered April 15, 1936. This petition for certiorari was filed before July 15, 1936.

Questions Presented.

1. Whether the Joint Resolution of June 5, 1933, applies to the rental provisions in the contracts in question.

This question involves the determination of the subordinate questions:

(*a*) Whether Congress intended by the passage of the Joint Resolution of June 5, 1933, to affect the discharge of contracts, such as those in question here, providing in ex-

press terms for the delivery, as rentals, of a quantity of gold as a commodity or the equivalent thereof in United States currency.

(*b*) Whether the application of the Joint Resolution to the contracts in question here would constitute the exercise by Congress of a power not delegated to it by the Constitution of the United States in contravention of Article X of the Amendments thereof.

(*c*) Whether the application of the Joint Resolution to the contracts in question here would constitute a deprivation of the property of the petitioner without due process of law in contravention of Article V of the Amendments to the Constitution of the United States.

The foregoing questions are presented by the error of the Circuit Court of Appeals in determining that the Joint Resolution is applicable to the contracts in question. If they be determined in favor of your petitioner, an additional question is presented, namely:

2. Whether, if the rental provisions may not be so discharged by force of the Joint Resolution, the equivalent in currency of the quantity of gold specified therein is to be determined with reference to the ratio between gold and currency established by law on the dates when the rentals in question became due.

Resolution Involved.

Public Resolution No. 10 of the 73d Congress, passed on June 5, 1933, otherwise and herein referred to as the Joint Resolution, is set forth in Appendix A annexed to this petition.

Statement of Matter Involved.

Your petitioner, in 1859, acquired the right to impound the water of the Connecticut River at Holyoke, Massachu-

setts, and to dispose of rights to use the same for power and manufacturing purposes (R. 91). Some of these rights, in units called "mill powers," the Company leased, between 1880 and 1898, under thirteen indentures, to predecessors in title of the respondent American Writing Paper Company, which later acquired them by mesne conveyances (R. 91, 92).

The terms under which these mill powers were leased and are held provided that the Water Power Company should forever maintain and keep in order and repair the dam and principal canals (Ex. 1, Art. III, R. 28), and that the grantees and their successors should pay forever a yearly rental for the mill powers. The rental provision which is agreed to be typical of all those in question in this case calls for the annual payment in perpetuity of—

> "a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the coinage of the year one thousand eight hundred and ninety-four or the equivalent of this commodity in United States currency . . ." (R. 23, next to the last line).

(It should be noted that this provision is inaccurately quoted in the opinion of the Circuit Court of Appeals, at page 92 of the Record, from which the words "in amount" are omitted.)

The Water Power Company brought a petition to determine the amount of its claims under the said thirteen indentures, for rentals payable July 1, 1934, October 1, 1934, and January 1, 1935 (these dates being subsequent to the devaluation of the dollar). The District Court held that the contracts were not within the meaning of the provisions of the Joint Resolution and so were not to be discharged "dollar for dollar" (R. 73), quoting with approval from

the ruling and finding of Judge McLellan, in the earlier case resting upon these same indentures, that the indentures contain no covenant to pay any definite sum of money, and that the discharge of the obligations "dollar for dollar" could not be decreed without doing violence to the intention of the parties (R. 71). The Court then held, however, that the obligor's option to deliver quantities of gold in payment of the rentals had become impossible of performance by virtue of legislation and executive orders restricting the use of gold (R. 73), and that the equivalent of the various quantities of gold in currency was to be established by multiplying the number of ounces of pure gold by $20.67 per ounce (R. 77, 69).

A sum so computed having already been paid, the bill was dismissed (R. 69). The Water Power Company, your petitioner, appealed to the Circuit Court of Appeals. That Court held, contrary to the opinion of the District Court, that the Joint Resolution did apply to these contracts, stating (R. 101):

> "the rentals in these indentures may be discharged by the payment, dollar by [*sic*] dollar, of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals."

Although the Circuit Court of Appeals thus disagreed with the conclusion of the District Court as to the applicability of the Joint Resolution, the result, in terms of dollars in currency payable, was the same, and the decree of the District Court was accordingly affirmed as to the amount of the petitioner's claim (R. 102, 104).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the decree of the District Court as to the amount of the petitioner's claim (R. 104).

2. In holding that the rentals in these indentures may be discharged by the payment, "dollar by dollar," of the amount which the quantity of gold named therein equals in gold coin of the weight and fineness of the years specified in each indenture, or in the indenture of March 1, 1895, by the payment of $1500 in any currency which was legal tender for public or private debts on the due dates of the rentals (R. 101, 102).

3. In holding, in substance, that a resolution by Congress providing that contracts for the delivery of a quantity of gold as a commodity, or, in the alternative, for the payment of the equivalent of this commodity in United States currency, may be discharged by the payment, dollar for dollar, of the amount which the quantity of gold named therein equals in gold coin of a certain weight and fineness, has a reasonable relation to the end which Congress had in view in passing the Joint Resolution (R. 99, 100).

4. In failing to hold that Congress, in the exercise of its power to regulate the currency, has interfered with contracts providing for the delivery of a quantity of gold as a commodity (if the Court was right in holding that such contracts are within the terms of the Joint Resolution) in violation of Article V and of Article X of the Amendments to the Constitution of the United States.

5. In holding (R. 98) that the rental provisions in these indentures are "gold value clauses" within the meaning of the decisions in *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240, and *Nortz* v. *United States*, 294 U.S. 317.

6. In holding, in substance, (R. 100, l. 22 *et seq.*) that the Joint Resolution provides that all obligations that are

measured in terms of gold are payable dollar for dollar in any currency which is legal tender at the time of payment.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals, in applying the Joint Resolution to the contracts in question here, disregards the express provision of that Resolution that as used in the Resolution, "obligation" means an obligation payable in money of the United States (Appendix A, sub-paragraph (b)).

2. The legislative history of the Joint Resolution indicates that the condition sought to be remedied by the Resolution was the existence of negotiable obligations to repay money already advanced and that an intention to interfere with the discharge of commodity contracts was not only absent, but was specifically disclaimed (see Appendix B).

3. The Circuit Court of Appeals, in so far as it rested its decision upon the Gold Cases, or upon any of them, misconceived the purport and scope of those decisions, all of which involved the effect to be given to obligations payable in gold coin of the United States, and constitute no authority for the application of the Joint Resoluion to a non-negotiable contract calling for the delivery of gold as a commodity or for the payment of its equivalent in currency.

4. The application of the Joint Resolution to the contracts in question here would constitute the exercise by Congress, under the guise of an exercise of its power to regulate the currency, of a power not delegated to it by the Constitution, and would therefore contravene Article X of the Amendments thereof.

5. The application of the Joint Resolution to the contracts in question here would constitute a direct deprivation of the rights of your petitioner under contracts

providing for the delivery of a commodity, and would therefore contravene Article V of the Amendments to the Constitution of the United States.

6. The decision of the Circuit Court of Appeals is inconsistent with the opinion of Mr. Justice Bradley, which was necessary to the decision in the *Legal Tender Cases,* 12 Wall. 457 (1870). The learned justice (from whose opinion the Honorable Chief Justice of this Court quoted with approval in his opinion in *Norman* v. *B. & O. R.R.,* 294 U.S. 240, at p. 307) stated that—

> "If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is *bona fide* for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed" (12 Wall. at p. 566).

It is not difficult to suppose that the contracts involved in the instant case were made in reliance upon this utterance of the highest judicial authority.

7. The question of whether the Joint Resolution should be so construed as to affect the discharge of a contract in which the parties expressly provided for the delivery of a quantity of gold as a commodity, or for the payment of an equivalent amount of currency, is a question of great importance to your petitioner. Since the performance of its obligations to maintain the dam and canals at Holyoke in perpetuity without loss necessarily rests upon the continued receipt of income commensurate with the financial requirements of this performance, and since it may reasonably be expected that these requirements will increase in accordance with the declared policy of the government in devaluating the dollar, the determination of this question involves the continued solvency and existence of the Holyoke Water Power Company. These rights of the Water Power Company are necessarily also the rights of its many

stockholders, and they are to be affected by the final determination of this cause not only with reference to the past, nor even only to the immediate future, but to perpetuity.

As an illustration of what this decision means to the petitioner if not reversed, one might assume that, if in the recent New England floods the crest of the dam to a depth of five feet across the Connecticut River was carried away by the ice jam, the abutments of the gatehouse, the maintenance of which is necessary to the supply of water through the canals for indentured lessees, were weakened, and the cost of repairs was $100,000, then if, as is quite possible, such another flood should occur in the future, when prices and costs had been adapted to a 59-cent dollar (or in case of further devaluation to an even cheaper dollar than that), it can easily be seen that the petitioner would be quite unable to comply with the obligation placed upon it by the indentures, and intended to be safeguarded by the rentals of quantities of gold, to maintain at all times the hydraulic system essential for providing the water power to which the respondents in this case would be entitled under the indentures.

8. The vital importance of this question to your petitioner and its stockholders has its counterpart in the cases of other lessors of real estate or of rights in the nature of real estate, and of other parties entering into undertakings for the performance of burdensome obligations, other than for the mere payment of money, in the more or less distant future, such as continuing services, supply of materials, and maintenance and renewals of plants and buildings.

Your petitioner submits that the final determination by this Court of the questions of law involved in this case is therefore of the utmost importance to the rights of your petitioner and of its shareholders, both now and in perpetuity, and to other parties in similar circumstances, and

that this Court should therefore determine these questions.

The decision of the Circuit Court of Appeals is not only contrary to the intention of Congress in passing the Resolution upon which it is based, but is without precedent or authority in any of the decided cases of this Court in which the power of Congress to regulate the currency has been defined.

Unless the error in that decision be corrected by this Court, the effect will be to deprive your petitioner and its shareholders of substantial rights which are guaranteed by Articles V and X of the Amendments to the Constitution of the United States.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

HOLYOKE WATER POWER CO.
By BENTLEY W. WARREN,
Attorney for Petitioner.

Of Counsel:
NATHAN P. AVERY,
JAMES M. HEALY,
DONALD C. STARR.

Appendix A.

Joint Resolution of Congress of June 5, 1933.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby

repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

" 'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

"Approved, June 5, 1933, 4:40 p.m."

Appendix B.

(The following is quoted from the petitioner's brief in rebuttal before the Circuit Court of Appeals, pp. 9 and 10.)

"Senator Borah at one point declared: '. . . I contend that Congress may declare that a dollar with 12.9

grains must be accepted in payment of a dollar of 25.8 grains. It may fix the value of the dollar, the value of the money. . . . I am not discussing now a commodity contract; I am discussing a contract to pay dollars' (vol. 77, Cong. Rec. No. 67, p. 4999), and again: 'It [the Government] does not assume to enter into a commodity contract. It does not assume to pay a certain amount of bullion. It agrees to pay so much money, and defines what the dollar is, etc., but it does not agree to deliver so much bullion. It is not a bullion contract, and is not so regarded. It is a negotiable instrument. The dollar sign is printed all over it.' (Ibid. p. 5001.) At another point in the debate, Senator Fletcher stated: '. . . This Joint Resolution deals with interest-bearing obligations. It does not disturb the base of the currency, as far as that item is concerned.'

"Further, an important reason for the passage of the Joint Resolution advanced by Representative Steagall was that 'a limitation of the effect of the Resolution to contracts between private persons and future contracts of the government, would seriously impair the power of the government to borrow money . . .' (77 Cong. Rec. No. 62, p. 4585). The rationale of this point was that, if gold obligations then existing were left untouched, investors would be loath to subscribe to new government loans not payable in gold while issues payable in gold were still outstanding and procurable in the market. Related arguments based upon the effect on investments generally were urged by the government in its argument in the *Norman* case. It is clear that any considerations of the effect of the governmental action upon the investment market for bonds could have no application to non-negotiable obligations, and that therefore Congress could not in this respect have contemplated interference with, for instance, non-negotiable leases."